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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 615

STEWART DIE CASTING CORPORATION,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF STEWART DIE CASTING CORPORATION, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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FRANK H. TOWNER,
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PETITION OF STEWART DIE CASTING CORPORATION, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Stewart Die Casting Corporation, a corporation, submits this petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, and files herewith a certified copy of the entire transcript of record in said cause, and its brief in support of this petition. The decision of the Court of Appeals is not yet reported but appears at pages 1688 to 1705 of the printed record. That decision sustained in part a Decision and Order of the National Labor Relations Board, Respondent herein.

Summary Statement of the Matter Involved.

The evidence taken in the hearings before the Respondent is voluminous, and includes three volumes of printed record together with numerous exhibits which are certified to this Court as originals (R. 1723). Much of this material has no bearing upon the questions presented by this petition. In stating the matter involved, we shall therefore confine ourselves to a statement of those matters which do relate to the questions presented herein.

The order of Respondent here involved was entered on August 22, 1939 (R. 1611) and amended on August 23, 1939, (R. 1662). It was made in two cases pending before Respondent, one entitled "In the Matter of Stewart Die Casting Corporation and United Automobile Workers of America, Local 298," Case No. C-195, subsequently numbered as Case No. C-577, and the other entitled "In the Matter of Stewart Die Casting Corporation and Bernice Andrews, *et al.*," Case No. C-688, subsequently numbered as No. C-869. These cases were consolidated (R. 1591), but no attention need be given to Case No. C-688 (No. C-869) as all the matters dealt with in this petition arose in the other case.

In Case No. C-195 (No. C-577) the complaint, issued on January 4, 1938 (R. 29-35), was based upon a second amended charge (R. 37-40) dated January 4, 1938, and filed with Respondent by United Automobile Workers of America, Local 298 (hereinafter called the "Union"). This charge, in addition to allegations that Petitioner was guilty of various violations of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. A. Sec. 151, *et seq.*; hereinafter called the "Act"), alleges that a strike started at Petitioner's plant on or about March 16, 1937, and that Exhibit "A", attached to the charge is a list of persons who were working in Petitioner's plant prior to March

16, 1937, and "who either have been refused reinstatement or reemployment by the Company following the strike, or have been reemployed but without reimbursement for loss of pay or reinstated to their former positions in the plant" (R. 37, 38).

Upon the basis of this charge, Respondent issued its complaint herein on January 4, 1938 (R. 29, *et seq.*). In addition to the usual jurisdictional averments, the complaint alleges that on March 16, 1937 certain of Petitioner's employees went on strike; that on that date Petitioner locked out the remainder of its employees, and that the unlawful refusal of Petitioner to bargain collectively with the Union caused Petitioner's employees to remain on strike (R. 31). Paragraphs 9, 10 and 11 of the complaint name 183 individuals, dividing them into three classifications.

Paragraph 9 (R. 31-33) lists 146 individuals, alleges that they participated in the strike and that Petitioner, on June 24, 1937 and thereafter failed and refused to reinstate them in their employment. This paragraph was subsequently amended by the addition of 11 names, certain corrections in spelling, and the elimination of 14 names (R. 41, 42). Paragraph 10 (R. 33-34) lists 37 individuals, alleges their participation in the strike, and that they had not been reinstated to their employment by Petitioner from June 24 until the dates set opposite their respective names. This paragraph was subsequently amended by the addition of 16 names and by certain corrections in the original list (R. 43). Paragraph 11 (R. 34) lists 8 individuals who are also listed in paragraph 10, and alleges that they were discharged by Petitioner on the dates set opposite their respective names, and have not been thereafter reemployed by Petitioner. This paragraph was subsequently amended by the addition of 35 names and by certain corrections in the original list.

Respondent also undertook to amend the list of names at-

tached to the second amended charge upon which the complaint was issued, the charge being attached to the complaint, but only by adding 15 names thereto (R. 45). As amended, the charge lists 197 persons, all of whom are also listed in the amended complaint. Thus, paragraph 9 of the amended complaint lists 143 persons, paragraph 10 lists 53 persons, and paragraph 11 lists 43 persons, all but one of those listed in paragraph 11 being also listed in paragraph 10.

With respect to all individuals thus listed, the complaint alleges that Petitioner either refused to employ them after the strike or, having reemployed them, had subsequently discharged them because they joined and assisted the Union (R. 34). In this respect, the complaint is not in accordance with the second amended charge on which it is based, since the charge, even as amended, does not allege any violation of law by Petitioner through the discharge of any person subsequent to the strike. Paragraph 11 of the complaint as amended, however, alleges such a discharge of 43 individuals.

Petitioner's answer to the complaint (R. 48-49) generally denies all its allegations and sets up the inadequacy of the second amended charge as a basis for the issuance of the complaint. The hearings before Respondent occupied the period from January 20, 1938 (R. 53) to February 9, 1938 (R. 1256) and thereafter, on March 12, 1938 (R. 1257) and on May 19, 1938 (R. 1266), Respondent took the testimony of three witnesses by deposition.

The evidence shows that Petitioner is a Delaware corporation incorporated on October 5, 1917 and that it operated a plant at 4535 Fullerton Avenue, Chicago. Its business was the production of metal castings, tools and similar products. Certain facts with respect to its business were stipulated (R. 50-52) and the case does not present any question of jurisdiction.

Prior to March 17, 1937, Petitioner's officials had no knowledge of the union affiliations, if any, of its employees, and membership or non-membership in a union was not a condition of employment (R. 946, 1050). There is no evidence that prior to March 12, 1937, any of Petitioner's employees had ever been members of a union. About March 12, 1937, an organizer of the Union named Brown first undertook the organization of Petitioner's employees (R. 127, 1619).

About midnight of March 15, 1937, the employees then composing the night shift in the cleaning department decided to and did stage a sit-down strike (R. 953, 72, 156, 176, 186, 208, 255). This action was taken without notice to any officer of Petitioner, although earlier in the evening of March 15, 1937, there had been some rumors which had caused Petitioner's officers to go to the plant during the evening (R. 952, 953, 956). The men who started the sit-down strike were joined by men who were then working in other departments (R. 156, 157, 208), although some who were in the plant when the strike started thereafter left (R. 157, 188, 191). The statements as to the number of sit-down strikers varied from 75 to 150 (R. 156, 176, 186, 954), and the Decision and Order of Respondent states the number as approximately 150 (R. 1619).

The apparent cause of the sit-down strike was the dissatisfaction of individual employees with respect to certain things that had happened (R. 157, 158, 171-176, 205, 208) and they promoted the strike (R. 154, 169). No complaints or demands for union recognition had been made to officers of Petitioner prior to the sit-down strike (R. 952, 956, 1020, 1021, 184, 187, 202). The Union made no claim that it approached Petitioner prior to March 16, 1937, while the sit-down strike was in progress (R. 128), and Respondent did not find that that strike occurred during a pending labor dispute or that it resulted from any unfair

practice of Petitioner. On the contrary, it found that Petitioner's first violation of the Act was a refusal to bargain on March 23, 1937 (R. 1628), which refusal was found to be the cause of the continuance of the strike from and after that date (R. 1632).

The announced purpose of the sit-down strike was to stop production in the plant (R. 163), the strikers having taken possession of the lower floor of the plant (R. 1023, 1024) and barricaded the door (R. 163, 956). The strikers held possession of the lower floor of Petitioner's plant until the early morning of March 17, 1937, when they were ejected by the Chicago police (R. 156, 164, 211, 956, 957). To gain entry, the police were compelled to break down the door which had been barricaded by the strikers (R. 164, 956, 1038, 1039, 1068, 1069), but the strikers left peaceably when ordered to do so (R. 957).

During the day the strikers had possession of the plant, Petitioner's representatives made numerous unsuccessful efforts to get them to leave (R. 178, 179, 184, 1024, 1025, 1097, 1098). When the day shift came to work on the morning of March 16, 1937 they were sent home by Petitioner's officers and told that they would be notified when to return (R. 1021, 1022, 1066). This action was taken at the request of the Chicago police (R. 954, 955).

Upon the ejection of the strikers in the early morning of March 17, 1937 Petitioner closed its plant for the purpose of checking over its machinery, stock on hand, etc., to be sure that no damage had been done, and kept the plant closed until March 25, 1937 (R. 957). On that date, Petitioner reopened its plant and from then on did what it could to secure the return of its employees to work. It circulated an offer to its employees advising them that those who returned prior to April 5, 1937, would be paid for the time between March 16, when the sit-down strike occurred, and the date they returned to work (R. 972, 1006,

1007, 1029) and would also be given an increase in wages which had been decided upon prior to the sit-down strike (R. 1030, 1035). As a result of this offer many employees of Petitioner, including some of the sit-down strikers, returned to work (R. 191, 192).

The balance, however, stayed on strike and picketed Petitioner's plant, and as a result of their refusal to return to work, Petitioner was compelled to hire enough new employees to carry on its necessary activities (R. 1029). The strike was carried on from March 17 until June 24, 1937, and during that period a number of conferences were held between Petitioner and representatives of the Union and of its employees. Petitioner had enough employees, including those who had returned to work and those newly employed, to carry on its operations and did so (R. 972, 973). During the week of June 21, 1937 a series of conferences were held, culminating in an agreement on June 24, 1937, under which agreement the strike was settled (R. 263-275, 353-366, 1207-1210). Upon the making of this settlement, the pickets at Petitioner's plant were withdrawn on June 25, 1937 (R. 318) and the strike was considered settled.

Respondent's Decision and Order herein was made on August 22, 1939 (R. 1611, *et seq.*), and amended on August 23, 1939 (R. 1662). It is entitled in both cases before Respondent, and includes a statement of the case (R. 1612-1616), findings of fact (R. 1616-1654), conclusions of law (R. 1654, 1655), and an order (R. 1655, *et seq.*). Attached thereto as Appendices A, B and C, are three lists of named persons (R. 1659-1662). Generally speaking, the Decision and Order of Respondent decided all issues against Petitioner.

It requires Petitioner to cease and desist from certain activities (R. 1655, 1656) and makes a number of affirmative requirements. One requirement is that Petitioner offer immediate and full reinstatement to 154 named per-

sons (R. 1656), and upon application, to all employees of Petitioner who were on strike on March 23, 1937, and who have not been reinstated (R. 1657, 1658), placing those for whom employment is not available upon a preferential list. This requirement makes no distinction between those who engaged in the sit-down strike and those who did not, nor between those listed in the amended charge and amended complaint and who testified, and those who were not so listed and concerning whom there was no testimony. It grants to all persons on strike on March 23, 1937, and who have not been reinstated and to all persons listed in Appendix B to the Decision and Order a relief not asked in the charge upon which the complaint was based, and finds the discharge by Petitioner of those listed in Appendix B to be a violation of law, although that charge did not allege such a violation.

A second requirement is that Petitioner make various payments to 165 named persons, without regard to whether or not they engaged in the sit-down strike (R. 1656, 1657). This requirement also confers upon the persons listed in Appendix B to the Decision and Order a benefit not asked for in the charge upon which the complaint was based, the benefit being granted because of a discharge not alleged in the charge to be a violation of law.

A third requirement is that Petitioner make certain payments, under stated circumstances, to all of its employees who were on strike on March 23, 1937, and who have not been reinstated (R. 1658). This requirement also makes no distinction between those who did and those who did not engage in the sit-down strike. It also runs in favor of persons not named in the complaint or the charge upon which it was based, who are not identified in the evidence or in the Decision and Order, and concerning whom there is no testimony whatsoever in the record.

Upon the making of this Decision and Order, Petitioner

filed its petition in the Circuit Court of Appeals for the Seventh Circuit to annul and set aside the Decision and Order (R. 2-19). Respondent filed an answer to that petition (R. 20-28) with which it joined a prayer for enforcement of the Order (R. 28). The decision of the Court of Appeals (R. 1688-1705) was handed down on July 3, 1940.

The Court of Appeals sustained the requirement that Petitioner offer reinstatement to the sit-down strikers and give them back pay, on the grounds that Petitioner did not discharge the sit-down strikers, that it did not discriminate against them in reemployment, and that all of them were not identified in the record (R. 1697, 1698). The Court of Appeals sustained the requirement that Petitioner offer reinstatement to all persons who were on strike on March 23, 1937, and who had not been reinstated, and give them back pay under certain conditions, upon the ground that since Respondent had found that Petitioner's refusal to bargain with the Union caused the continuance of the strike, the proper remedy for such violation of law was reinstatement and reimbursement for those affected by such unfair labor practices (R. 1699). The Court of Appeals also sustained the requirement that Petitioner offer a second reinstatement and give back pay to the persons listed in Appendix B to the Decision and Order, on the ground that Respondent had power to take cognizance of an unfair labor practice occurring after the filing of the complaint (R. 1700).

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Decree in Question.

This Court's jurisdiction to issue the writ of certiorari prayed for herein is established by Section 240 of the Judicial Code as amended (U. S. C. A., Title 28, Sec. 347), which reads in part as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether governmental or other litigant, to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error on appeal."

After providing for review in certain cases by writ of error or appeal, the same section of the statute further provides:

> "No judgment or decree of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than is provided in this section."

Sections 10(e) and 10(f) of the Act (49 Stat. 449; 29 U. S. C. A., Secs. 151, *et seq.*) also provide for the review, upon writ of certiorari, of the decision of the Court of Appeals herein. Section 8 of the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 350) provides in part as follows:

> "No writ of error, appeal or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The decision of the Court of Appeals herein was handed down on July 3, 1940 (R. 1688). Petitioner filed its petition for rehearing in the Court of Appeals on July 18, 1940 (R. 1705) and that petition was denied on October 18, 1940 (R. 1711). The decree of the Court of Appeals (R. 1712-1717) was entered on October 29, 1940. This petition is therefore filed within the three months following the denial of Petitioner's petition for rehearing in the Court of Appeals and the entry of a decree in that Court.

The Questions Presented.

Petitioner presents three questions for decision in this case as follows:

1. May Petitioner be required to offer reinstatement and make payments to those of its former employees who engaged in the sit-down strike on March 16, 1937.

2. May Petitioner be required to offer reinstatement and make payments to the 41 persons listed in Appendix B to Respondent's Decision and Order, since the charge upon which the complaint herein was based did not complain of the discharge of these persons subsequent to their reemployment by Petitioner, and charged no violation of law by reason of such discharge.

3. May Petitioner be required to offer reinstatement to all of its employees who were on strike on March 23, 1937, and who have not been reinstated, and under some circumstances, to make payments to them, since such persons were not listed in the charge or complaint, were not identified by name or otherwise, there were no allegations in their behalf of law violations by Petitioner, and there was no evidence in the record relating to them.

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon by Petitioner for the allowance of the writ herein are:

1. In sustaining the requirement of the Decision and Order that Petitioner offer reinstatement and make payments to the participants in the sit-down strike, the Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court, and in conflict with a decision of the Circuit Court of Appeals for the Third Circuit on the same matter.

2. In sustaining the requirement of the Decision and Order that Petitioner offer reinstatement and make certain payments to the persons listed in Appendix B to said Decision and Order, the Court of Appeals has decided an important question of federal law which has not been but should be definitely settled by this Court, and has made a decision in conflict with decisions of the Circuit Courts of Appeal for the Second and Sixth Circuits on the same matter.

3. In sustaining the requirement of the Decision and Order that Petitioner should offer reinstatement and under some conditions, make payments to all of its employees who were on strike on March 23, 1937, and who have not been reinstated, the Court of Appeals has decided an important question of federal law which has not been but should be definitely settled by this Court, has made a decision in conflict with decisions of the Circuit Courts of Appeal for the Second, Fifth and Sixth Circuits on the same matter, and has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by Respondent as to call for an exercise of this Court's power of supervision.

WHEREFORE Petitioner prays that this petition for a writ of certiorari directed to the United States Circuit Court

of Appeals for the Seventh Circuit may be granted, and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing the judgment of the Circuit Court of Appeals for the Seventh Circuit upon the matters herein specified be reversed.

Respectfully submitted,

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FRANK H. TOWNER,
Counsel for Petitioner.